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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MORONGO UNIFIED SCHOOL DISTRICT, et al.,
Petitioners,
vs.
JAMES SANDS, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the United States Supreme Court have Article III jurisdiction to grant a Petition for Certiorari in a case arising from the decision of the highest court of a state where the plaintiff proceeded under a state taxpayer standing statute which creates broader standing than Article III jurisdiction requires and the defendants have suffered no personal injury as a direct result of the decision of the state court?

Does the inclusion of invocations and benedictions in the form of prayer in the graduation ceremonies of public high schools in the Morongo Unified School District violate the Establishment Clause of the First Amendment of the United States Constitution, particularly where the record demonstrates that the prayers have been almost exclusively delivered by Protestant and Catholic clergy?

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On Petition For A Writ of Certiorari
To The Supreme Court of California

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents James Sands and Jean Bertolette submit this brief in opposition to the Petition for a Writ of Certiorari filed in this case by the Superintendent and board members of the Morongo Unified School District.

STATEMENT

Respondents James Sands and Jean Bertolette are taxpayers residing in the defendant Morongo Unified School District. [Clerk's Transcript on Appeal (hereinafter "CT") 2] Neither plaintiff has children in the defendant school district. [CT:346] Defendants are the superintendent and board members of the Morongo Unified School District ("MUSD"). They are sued in their official capacity only. [CT:2, 3]

MUSD has included as a regular part of the public school commencements in the district a prayer in the form of an invocation and benediction delivered almost exclusively by Christian clergy. [CT:181-183] *Sands v. Morongo Unified School District,* 53 Cal. 3d 863, 868-869, 809 P.2d 809 (1991). At most of the district's facilities, school officials select or retain final approval of the individual to lead these devotional exercises. *Id.* at 868.

Although the speakers have almost uniformly been clergy, a teacher has on a few occasions delivered one or more of the prayers at a high-school site which permits students to participate in the selection process of the graduation program. *Id.* at 868-869.

Students are not informed that the graduation ceremony is voluntary. [CT:172, 232] In addition, public school administrators and board members participate in the ceremonies in their official capacity. *Sands,* 53 Cal. 3d at 869.

The decision of the California Supreme Court applied the test established by this Court in *Lemon v. Kurtzman,* 403 U.S. 602 (1971). After analyzing the purpose of prayer, the majority of the California Supreme Court concluded that the practice of including sectarian devotional exercises in public school gradu-

ations violated the "effect" prong of *Lemon. Sands,* 53 Cal. 3d at 869, 872, 885, 916.

REASONS FOR DENYING THE PETITION

I

BECAUSE BOTH THE PLAINTIFFS AND DEFENDANTS LACK ARTICLE III STANDING, THIS COURT LACKS JURISDICTION TO GRANT CERTIORARI

A. Plaintiffs Lack Standing Because They Have Alleged No Particularized Personal Injury Likely to Be Redressed By the Relief They Have Sought

In order for the Supreme Court to review any case, all justiciability requirements derived from Article III must be met. *Asarco v. Kadish,* 490 U.S. 605, 612 (1989). This case comes before the Court as a taxpayer action from the highest court of a state. Thus far, this Court has been very restrictive in permitting Article III taxpayer standing under claims virtually identical to those presented here.

In *Doremus v. Board of Education of the Borough of Hawthorne,* 342 U.S. 429 (1951), this Court reviewed the claim of a taxpayer plaintiff who petitioned for certiorari from the decision of the Supreme Court of New Jersey. This Court held in *Doremus* that the status of the plaintiff in that case, who asserted standing as citizen and taxpayer, with nothing more, did not support the jurisdiction of this Court. *Id.* at 432. The Court's opinion found the "complaint . . . niggardly of facts to support a taxpayer's grievance." *Id.* at 433. Accordingly, this Court concluded that the bare assertion of taxpayer standing was insufficient to confer Article III jurisdiction.

Like the plaintiffs in *Doremus,* the individual plaintiffs here claim standing solely as taxpayers under a state statute which accords broad standing in state court to challenge alleged unlawful conduct by the government on the barest allegations of taxpayer status, irrespective

of personal interest or stake in the issue at controversy. *Sands,* 53 Cal. 3d at 869. [CT:67, 69]

Under California Civil Code § 526a,[1] allegedly unlawful acts of government may be challenged in the California courts even where there exists no individual who can demonstrate the type of personal injury necessary to satisfy the requirements of Article III standing in the federal courts. *Van Atta v. Scott,* 27 Cal. 3d 424, 447, 613 P.2d 210 (1980). California Civil Code

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[1] California Code of Civil Procedure § 526a provides, *inter alia,* as follows:

> An action to obtain a judgment, restraining and preventing any illegal expenditure or, waste of, or injury to, the estate, funds, or other property of a [political entity] may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid a tax therein.

§ 526a requires no showing of any expenditures directly linked to the challenged practice. *Blair v. Pitchess,* 5 Cal. 3d 258, 268, 486 P.2d 1242 (1971). Moreover, it is of no import that individuals exist who are directly harmed by the statute or practice and who could therefore meet the ordinary requirements of standing. *Van Atta,* 27 Cal. 3d at 447. Indeed, California courts have repeatedly emphasized the differences between Article III and § 526a standing requirements. *Id.* at 449-450 & n.28; *White v. Davis,* 13 Cal. 3d 757, 763, 533 P.2d 222 (1975). In accord with California law, these plaintiffs need not and do not purport to make this a "good-faith pocketbook action." *Doremus,* 342 U.S. at 434.

Although plaintiffs clearly meet the broad standing criteria under California law, this Court has held that an individual does not meet the standing requirement of Article III based solely on that person's status as a

taxpayer expressing a generalized concerned about the actions of the government. *Schlesinger v. Reservists Committee to Stop the War,* 418 U.S. 208, 215-21 (1974); *Doremus v. Board of Education,* 342 U.S. 429, 433-35 (1952); *Frothingham v. Mellon,* 262 U.S. 447 (1923).[2]

"[T]he special limitations that Article III of the Constitution imposes on the jurisdiction of the federal courts are not binding on the state courts." *New York State Club Ass'n, Inc. v. State of New York,* 108 S. Ct. 2225, 2231 n.2 (1988). At the same time, however, California "cannot define the contours of the authority of

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[2] This Court has recognized taxpayer standing, particularly in Establishment Clause cases, where minimum allegations of the relationship between tax appropriations and the alleged unconstitutional conduct are made. See *Grand Rapids School District v. Ball,* 473 U.S. 373, 380 n.5 (1985). In the instant case, plaintiffs have made no similar claims and defendants have vigorously maintained that plaintiffs could make no such showing. [CT:91, 110] In fact, defendants affirmatively argued below that plaintiffs could not demonstrate Article III standing. [CT:110, 276]

the federal courts, and more particularly of this Court." *Coleman v. Miller,* 307 U.S. 433, 462 (1939) (Frankfurter, J., concurring) (footnote omitted).

The taxpayer plaintiffs in this case cannot demonstrate standing to invoke the jurisdiction of an Article III court. Under *Doremus,* therefore, the appropriate response is to deny the Petition for Certiorari.

B. The Defendants Have Asserted No Personal Injury Sufficient to Satisfy Standing Under Article III

If the plaintiffs lack standing under Article III, then this Court lacks jurisdiction to review the judgment of the California Supreme Court unless the defendants are able to invoke independently the jurisdiction of the Court and satisfy the requirements of Article III standing. *Asarco,* 490 U.S. 605. The defendants here cannot meet the requirements of Article III as they assert no personal free exercise right, do not petition in

a representative capacity, and suffer no economic injury as a result of the California Supreme Court's decision.

In *Doremus,* this Court held that while a state court may "render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory, . . . [b]ecause our own jurisdiction is cast in terms of case or controversy, we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such." 342 U.S. at 434. See also *Secretary of State of Maryland v. J.H. Munson Co.,* 467 U.S. 947, 954 & n.4 (1984).

This Court "may exercise . . . jurisdiction on certiorari if the judgment of the state court causes direct, specific and concrete injury to the parties who petition for our review, where the requisites of a case or controversy are also met." *Asarco,* 490 U.S. at 623-624. Thus,

the threshold requirement of standing on petition for certiorari "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Valley Forge Christian College,* 454 U.S. 464, 484 (1982), citing *Flast v. Cohen,* 392 U.S. 83, 99 (1968).

In *Asarco,* this Court found that petitioners, defendants below, had suffered sufficient direct and particular injury by the "defined and specific legal obligation" imposed by the state court's decision. 490 U.S. at 617-618. In that instance, the petitioners held valuable mineral leases and were threatened personally with the loss of those leases and the income they produced as a direct result of the state court judgment. Thus, under the facts of that case, this Court concluded that petitioners were "faced with 'actual or threatened injury' that is sufficiently 'distinct and palpable' to

support their standing to invoke the authority of a federal court." *Ibid.*, quoting *Warth v. Seldin,* 422 U.S. 490, 500-501 (1975).

Petitioners here have personally suffered no similar injury "as a consequence" of the California Supreme Court's alleged constitutional error (454 U.S. at 485), "distinct and palpable," "actual or threatened." *Asarco,* 490 U.S. at 618. They come before the Court solely in their capacity as school officials and board members. Article III judicial power exists only to redress direct injury to the complaining party, even though the court's judgment may nonetheless benefit others. *Warth,* 422 U.S. at 499.

Here, the petitioners have no "personal stake in the outcome of the litigation." *Bender v. Williamsport Area School District,* 475 U.S. 534, 544-545 (1986); *Board of Education v. Allen,* 392 U.S. 236, 241 n.5 (1968). They

have no "legal right, 'the invasion of which creates standing . . . .'" *Valley Forge College,* 454 U.S. at 487 n.24 (citation omitted). They can advance no "personal constitutional [free exercise] right" on their own behalf. *Id.,* at 482. See also *Sands,* 53 Cal. 3d at 877; *Anderson v. City of Boston,* 376 Mass. 178, 380 N.Ed.2d 628 (1978), appeal dismissed, 439 U.S. 1060 (1979) (municipalities lack free speech rights). Finally, they assert no representational standing on behalf of anyone.[3]

Moreover, petitioners have maintained throughout this litigation that the practice of praying at public school graduation ceremonies is wholly voluntary and that the

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[3] Even if petitioners did assert some representational standing claim on behalf of the free exercise rights of the district's students, that claim must fail. This Court's decisions have recognized that "the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government." *Sherbert v. Verner,* 374 U.S. 398, 412 (1963). See also *Bowen v. Roy,* 476 U.S. 693 (1986).

students could readily decide to abandon the practice. Were this to occur, petitioners could not, consistent with the first amendment, initiate a lawsuit to force students to engage in compulsory prayer at school functions as such a practice would clearly constitute a violation of the students' free exercise rights, as well as the Establishment Clause. U.S. Constitution, Amendment I (Establishment Clause). See also *Engel v. Vitale,* 370 U.S. 421 (1963). Consequently, petitioners herein are not presented with the Hobson's choice of having to decide between their oath of office and violating a state law. *Cf. Board of Education v. Allen,* 392 U.S. at 241 n.5.

Even though the adverse parties in this instance are sincere in their aims, "sharply conflict[] in their interests and views and [may be] supported by able briefs and arguments" (*Schlesinger,* 418 U.S. at 225), the threshold requirements of Article III standing to invoke the

Supreme Court's jurisdiction have not been met by either party in this case and the petition should therefore be denied.

II

THE CALIFORNIA SUPREME COURT CORRECTLY FOUND ON THE RECORD IN THIS CASE THAT THE PRACTICE OF INCLUDING DEVOTIONAL EXERCISES LED ALMOST EXCLUSIVELY BY CHRISTIAN CLERGY AT PUBLIC SCHOOL GRADUATIONS VIOLATES THE ESTABLISHMENT CLAUSE

A. The Factual Record Supports a Determination That the Devotional Exercises at Issue Here Violate the Establishment Clause

In the Morongo Unified School District, "apart from a single nonreligious benediction at one high school in one year and a religious benediction at the same school the next year, every invocation or benediction in this case has been delivered by either a Protestant minister or a Catholic priest." *Sands,* 53 Cal. 3d at 868-

69. At one of the district's two continuation schools, the same clergyperson has delivered the invocation and benediction every year since the school's inception. [CT:90]; *Sands,* 53 Cal. 3d at 868.

Viewing this record, and reviewing several of the prayers which have been delivered, five members of the California Supreme Court necessarily and properly concluded that the prayers were explicitly religious and that the practice of engaging in prayers at the beginning and end of the public school graduation conveyed the "effect" of endorsing religion. *Id.* at 869, 872, 885, 916.

The majority of the California Supreme Court recognized that, in considering a challenge to the Establishment Clause, "*it is critical that [the court] view the issue from the perspective of the minority,* be they discordant, harmonious or eloquently silent, for they compose a large segment of the symphony which is

America." *Id.* at 915 (Arabian, J., concurring) (emphasis in original). Viewed from this perspective, the court concluded that the prayers at issue in this case have the "effect" of endorsing religion.

The majority of the California Supreme Court "recognize[d] and identif[ied] [prayer] for what it is -- a *religious* practice[.]" *Id.* at 917 (Arabian, J., concurring) (emphasis in original). Accordingly, the court "deline[d] to construe public prayer as essentially meaningless or trivial in order to find it inoffensive to the United States Constitution." *Id.* at 873 n.4, 916-917.

A prohibition on prayer at public school graduation ceremonies only serves to affirm the long-established rulings of this Court, as well as the fundamental principles which underlie the Establishment Clause. Thus, the opinion in *Sands* correctly recognized that "[t]he separation that the Establishment Clause

commands between religion and government manifests and promotes respect for religious pluralism and should not be perceived as hostility or indifference to religion." *Id.* at 870. As the *Sands* Court underscored, and as this Court recently held, "No misperception could be more antithetical to the values embodied in the Establishment Clause." *Ibid.,* quoting *County of Allegheny v. American Civil Liberties Union,* 492 U.S. 573, 610 (1989).

For three decades, this Court's opinions have applied the requirements of the Constitution, and particularly the Establishment Clause, most stringently in the area of the public schools. Those decisions have rejected the argument that "the religious practices here may be relatively minor encroachments on the First Amendment." *Abington School District v. Schempp,* 374 U.S. 203, 225 (1963). At the same time, this Court's opinions have affirmed the role of "'[t]he public school

[as] at once the symbol of our democracy and the most pervasive means of promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools. . . .'" *Edwards v. Aguillard,* 482 U.S. 578, 584 (1987).

In the Morongo Unified School District, the exclusively Christian prayer at public school graduations violates this fundamental rule.

B. The California Supreme Court Did Not Err in Not Analyzing the Challenged Conduct Under the Purpose Prong of the *Lemon* Test

Petitioners urge this Court to find some fundamental error in the fact that the majority of the California Supreme Court analyzed this case only under the second and third prongs of the *Lemon* test with five justices concluding that the challenged devotional exercises violated the second prong, the "effect" test, of this Court's long-standing establishment clause analysis.

This argument by petitioners misstates United States Supreme Court law.

As the majority of the California Supreme expressly recognized, "[i]f a challenged governmental action fails *any* of the three requirements of the *Lemon* test, it is unconstitutional. (*Edwards v. Aguillard,* [482 U.S. 578,] 583 (1987)." 53 Cal. 3d at 872 (emphasis supplied). Thus, although the lead opinion of the court expressed "doubts about whether the government-sponsored prayers at issue here pass the 'secular purpose' test," the justices recognized that it was unnecessary for the court to reach a determination as to whether the challenged practice also violated the "purpose" prong of *Lemon* in light of the conclusion of five justices that the prayers violated the "effect" prong of *Lemon. Ibid.,* 884-885, 916. Even if the Court had found no violation of the "purpose" prong, the practice is still rendered

unconstitutional because it violates the remaining two prongs of *Lemon*. *Edwards,* 482 U.S. at 583; *County of Allegheny,* 492 U.S. at 594.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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